STATE OF MICHIGAN

COURT OF APPEALS

BRUCE B. FEYZ,

Plaintiff-Appellant/Cross-Appellee,

v

MERCY MEMORIAL HOSPITAL, RICHARD HILTZ, JAMES MILLER, D.O., JOHN KALENKIEWICZ, M.D., J. MARSHALL NEWBERN, D.O., and ANTHONY SONGCO, M.D.,

Defendants-Appellees/Cross-Appellants,

and

MEDICAL STAFF OF MERCY MEMORIAL HOSPITAL,

Defendant.

FOR PUBLICATION
January 13, 2005
9:00 a.m.

No. 246259
Monroe Circuit Court
LC No. 02-014174-CZ

Official Reported Version

Before: Murray, P.J., and Sawyer and Smolenski, JJ.

MURRAY, P.J. (*concurring in part, dissenting in part*).

I agree with the majority's conclusion that plaintiff's statutory civil rights claims against defendants are subject to judicial review and that the peer review statute does not provide the hospital immunity to such claims. However, I disagree in part with the rationale underpinning the immunity issue, and with the majority's conclusion that *Hoffman v Garden City Hosp-Osteopathic*, 115 Mich App 773; 321 NW2d 810 (1982), and its progeny do not preclude judicial review of contract and contract-related tort claims that encompass a challenge to a private hospital's decision regarding a physician's staff privileges.

I. MCL 331.531

As the majority notes, MCL 331.531(3)(b) and (4) provide that a peer review entity is immune from civil liability for "an act or communication within its scope as a review entity," unless done with malice. The majority then concludes that a discrimination claim is not barred by the statute's grant of immunity because (1) an unlawful discriminatory act is not within the

scope of a peer review committee, and (2) an unlawful act of discrimination constitutes malice. According to the established case law defining malice under this statute, I agree with the second proposition. However, the majority's reading of MCL 331.531(3)(b) is too narrow.

In determining whether an act or communication is within the scope of a review committee, we cannot examine the legal result of the act or communication; instead, we must focus on the subject matter on which the initial act or communication complained of was made, i.e., the decision not to retain a physician, to suspend a physician, etc. "Scope" in this context means "range of operation." *Webster's New Collegiate Dictionary (1980).* See, also, *Backus v Kauffman (On Rehearing)*, 238 Mich App 402, 409; 605 NW2d 690 (1999) (defining scope of authority in the context of the governmental immunity statute). Otherwise, every time there is a potential for legal liability, there would be no immunity, which would defeat the purposes of the statute. As a result, I disagree with that part of the majority's analysis of MCL 331.531(3)(b).

More importantly, the majority has overlooked the definition of malice applied by this Court in both *Regualos v Community Hosp*, 140 Mich App 455, 463; 364 NW2d 723 (1985), and *Veldhuis v Allan*, 164 Mich App 131, 136-137; 416 NW2d 347 (1987). In *Veldhuis*, we adopted the defamation definition of malice to define the statutorily undefined "malice" found in MCL 331.531:

> We agree with defendant Davis Clinic that the definition of malice applicable in defamation actions also seems appropriate in the context of MCL 331.531; MSA 14.57(21). See *Regualos* [*supra* at 463], citing *Lins v Evening News Ass'n*, 129 Mich App 419; 342 NW2d 573 (1983). Applying that definition, the statutory immunity does not apply only if the person supplying information or data does so with the knowledge of its falsity or with reckless disregard of its truth or falsity. 129 Mich App 432. Similarly, a review entity is not immune from liability if it acts with knowledge of the falsity, or with reckless disregard of the truth or falsity, of information or data which it communicates or upon which it acts. [*Veldhuis, supra* at 136-137.]

See, also, *Savas v William Beaumont Hosp*, 216 F Supp 2d 660, 668-669 (ED Mich, 2002).

Admittedly, there is no discussion in either *Regualos* or *Veldhuis* regarding *why* the defamation definition of malice applies to this statute's reference to malice. Nonetheless, since that definition has been adopted and utilized in both our published and unpublished decisions, as well as by the federal courts applying Michigan law, we must, at minimum, apply that definition. If we do not, we must explain why.

Here, plaintiff alleges that the Medical Staff Executive Committee, in dealing with plaintiff, failed to adhere to the hospital bylaws and procedures. These failures resulted, according to the complaint, in violations of state and federal statutes, as well as common-law claims for breach of contract and torts. There can be no dispute that the Executive Committee, which oversees the medical staff and makes all decisions regarding the discipline of medical staff members, is a review entity as defined by the statute. MCL 331.531(2)(a) and (b). Additionally, the bylaws grant the Executive Committee the authority to create a "special committee," such as the ad hoc committee, to investigate matters submitted to the Executive Committee.

Because the Executive Committee was a review entity, its decisions are immune unless done with malice. In reviewing the detailed allegations within plaintiff's 157-paragraph complaint, plaintiff alleges that defendants referred him to the Health Professional Recovery Program (HPRP) with full knowledge that he had no mental or physical limitations. This allegation, which is the foundation for plaintiff's disability discrimination claims, fits within the definition of malice as articulated in *Veldhuis.* In other words, plaintiff's claim alleges that the Executive Committee sent him to the HPRP with knowledge that plaintiff had no impairment that qualified him for a referral or was reckless in disregarding that information when acting. This allegation falls squarely within the term "malice" as defined in *Veldhuis.* Moreover, to the extent that plaintiff has alleged a viable civil rights claim through other allegations, this too would fall within the definition of malice. Legal malice is defined as "[t]he intent, without justification or excuse, to commit a wrongful act." Black's Law Dictionary (7th ed). As counsel acknowledged during oral argument, discrimination claims may fall within the legal definition of malice because of the falsity (or, in discrimination terms, pretext) of the offered reasons for an act. It is also true that discrimination generally must be intentional to be actionable. See *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 315-319; 553 NW2d 377 (1996). Finally, through the state's civil rights acts, the Legislature has specifically authorized these claims to be brought against hospitals and their employees. Thus, the immunity under MCL 331.531 would not bar otherwise valid discrimination claims. *Mack v Detroit*, 467 Mich 186, 195 and n 9; 649 NW2d 47 (2002), citing *Manning v Hazel Park*, 202 Mich App 685, 699; 509 NW2d 874 (1993).

However, plaintiff's remaining tort and contract claims, to the extent they do not rely upon the referral to the HPRP, do not fall within the definition of malice and are barred under the statute. MCL 331.351. And, as shown below, those torts that do allege an improper referral are barred under the nonreviewability doctrine.

II. Nonreviewability Doctrine

In light of the obiter dictum in *Long v Chelsea Community Hosp*, 219 Mich App 578, 587; 557 NW2d 157 (1996),[1] the majority is correct in its holding that courts can and will review claims made by physicians that a private hospital has violated state statutory law, such as the Persons with Disabilities Civil Rights Act, MCL 37.1101 *et seq*. See, e.g., *Samuel v Herrick Mem Hosp*, 201 F3d 830, 834-835 (CA 6, 2000) (holding that district court properly reviewed statutory antitrust and discrimination claims).

However, to the extent that the majority holds that a contract or certain contract-related tort claims challenging a private hospital's staffing decision may be reviewed by the courts, I respectfully disagree. That is because our case law has squarely held that any contract claim and certain contract-related tort claims that require courts to inquire into the hospital's decision are not subject to judicial review.

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[1] *Long* did not involve a civil rights claim, so any statements in the opinion regarding civil rights claims and the nonreviewability doctrine were unnecessary to the resolution of the case.

The majority's analysis of the underpinnings for the nonreviewability doctrine is not complete. It is certainly true that one of the issues decided by the foundational case of *Shulman v Washington Hosp Ctr*, 222 F Supp 59 (D DC, 1963) was that a private hospital's decision was not subject to the same constitutional prohibitions as the decision of a public hospital. However, the *Shulman* Court provided an additional rationale to support its holding that courts should refrain from reviewing staffing decisions of private hospitals, the rationale primarily being that courts are ill-equipped to decide such issues:

> *There are sound reasons that lead the courts not to interfere in these matters. Judicial tribunals are not equipped to review the action of hospital authorities in selecting or refusing to appoint members of medical staffs, declining to renew appointments previously made, or excluding physicians or surgeons from hospital facilities.* The authorities of a hospital necessarily and naturally endeavor to their utmost to serve in the best possible manner the sick and the afflicted who knock at their door. Not all professional men, be they physicians, lawyers, or members of other professions, are of identical ability, competence, or experience, or of equal reliability, character, and standards of ethics. The mere fact that a person is admitted or licensed to practice his profession does not justify any inference beyond the conclusion that he has met the minimum requirements and possesses the minimum qualifications for that purpose. Necessarily hospitals endeavor to secure the most competent and experienced staff for their patients. Without regard to the absence of any legal liability, the hospital in admitting a physician or surgeon to its facilities extends a moral imprimatur to him in the eyes of the public. Moreover not all professional men have a personality that enables them to work in harmony with others, and to inspire confidence in their fellows and in patients. These factors are of importance and here, too, there is room for selection. *In matters such as these the courts are not in a position to substitute their judgment for that of professional groups.* [*Shulman, supra* at 64 (emphasis added).]

Thus, it was not just the legal significance between a public and private hospital that drove the *Shulman* decision. It was also the court's policy choice to refrain from intervening in an area in which it had no expertise, and in which the hospital officials had all the experience, duties, and incentives to ensure a qualified medical staff.

Significantly, this rationale has been carried forward into Michigan case law. In *Hoffman*, for example, our Court, citing and adopting *Shulman*, noted that the majority of jurisdictions had held that "a private hospital has the power to appoint and remove members *at will without judicial intervention*." *Hoffman, supra* at 778 (emphasis added). The rule is so concrete that in *Hoffman* we quoted with approval the *Shulman* Court's pronouncement that "[t]he decision of the hospital authorities *in such matters is final*." *Id.* at 779 (emphasis added).

To be more precise, *Shulman* and *Hoffman* both recognize that a public hospital is subject to constitutional safeguards such as due process, while a private hospital is not. But that rather obvious conclusion does not go hand-in-hand with the holding that "such matters," i.e., a decision affecting a physician's staff privileges, are "final" and unreviewable. Indeed, if the *Shulman* holding were based solely on the public/private hospital distinction, the holding would merely be that courts will not review due process or other constitutional challenges to a private

hospital's decision. But *Shulman* and *Hoffman* went much further, stating that a hospital's decisions are final, for which there should be no judicial interference. What explains that rather broad holding is the previously quoted explanation from *Shulman* that courts have decided that they are so ill-equipped to review such decisions that they will not do so absent an allegation that the hospital violated a state or federal statutory provision.

With this in mind, our courts have rejected requests to review private hospital decisions on physician staffing issues even when the challenges are brought as contract and contract-related tort claims. We recently recognized this principle in *Derderian v Genesys Health Care Systems*, 263 Mich App 364, 376-377; 689 NW2d 145 (2004):

> Rather, these cases merely state that *the staffing decisions of private hospitals are not subject to judicial review.* *Hoffman* [*supra* at 778-779]; *Regualos* [*supra* at 461]. This doctrine does not arise from a limitation on the court's authority, but, *in part*, from the distinction between public and private hospitals. In *Hoffman*, for example, the Court acknowledged that precedent required public hospitals to afford due process to physicians, *Milford v People's Community Hosp Auth*, 380 Mich 49; 155 NW2d 835 (1968); *Touchton v River Dist Community Hosp*, 76 Mich App 251; 256 NW2d 455 (1977), but recognized and chose to follow the majority position that private hospitals, on the other hand, have "the power to appoint and remove [staff] members at will without judicial intervention." *Hoffman*, *supra* at 778. *Since* Hoffman, *this Court has refrained from reviewing numerous claims, framed in various ways, that implicate the hospital's decision and the basis for its decision*, see e.g., *Sarin v Samaritan Health Ctr*, 176 Mich App 790, 794; 440 NW2d 80 (1989); *Veldhuis* [*supra* at 247], while "declin[ing] to articulate a broad principle that a private hospital's staffing decisions may *never* be judicially reviewed," *Long* [*supra* at 586]. [Emphasis altered in part.]

In point of fact, *Sarin* involved claims of breach of contract, tortious interference with a contract, and tortious interference with advantageous business relationships, all based on the hospital's decision to terminate the plaintiff's staff privileges. *Sarin*, *supra* at 791-792. Yet, we rejected the plaintiff's request to review these claims because of the *Hoffman* nonreviewability rule:

> Plaintiff's various claims revolve around questions regarding who the hospital review proceedings advanced, the composition of the board, its sources of information, claimed inaccurate information, and the actual decision to suspend and terminate his privileges. Moreover, plaintiff's tort claims are based on alleged violations of the bylaws. Thus, *we believe the trial court properly concluded that it could not review plaintiff's claims without intervening in the hospital's decision and interfering with the peer review process. In so ruling, we repeat our adherence to and support of the rule that prohibits judicial review of the action of a private hospital in denying staff privileges to a doctor.* [*Sarin, supra* at 795 (emphasis added).]

Likewise, in *Long* this Court upheld the trial court's decision refusing to review, on the basis of *Hoffman, Sarin,* and other cases, the plaintiff's breach of contract and promissory estoppel claims. *Long, supra* at 586-588.[2] See, also, *Muzquiz v W A Foote Mem Hosp, Inc*, 70 F3d 422, 430 (CA 6, 1995) (affirming district court's refusal to review physician's breach of contract claims, but reviewing the federal antidiscrimination claims).

Federal courts applying Michigan law have come to the same conclusion. In *Samuel*, the United States Court of Appeals for the Sixth Circuit held that the district court could not review the plaintiff physician's claim of tortious interference with contractual relations and business relationship because Michigan "follows an even more stringent rule that does not allow any review, even to ensure that the methods put forth by hospital for peer review are followed." *Samuel, supra* at 835. The court did note, however, that Michigan has an exception to the nonreviewability doctrine when hospitals are accused of violating state or federal laws, such as antidiscrimination laws. *Id.*

Similarly, in *Savas,* the plaintiff brought numerous statutory civil rights claims as well as tort claims for tortious interference with an advantageous business relationship and intentional infliction of emotional distress. These claims were based on the hospital's decision to suspend the plaintiff's clinical privileges. The district court granted summary judgment for the hospital, holding that the tort claims could not be reviewed because to do so would necessarily involve a review of the hospital's decision regarding the plaintiff's staff privileges:

> Michigan law states that there can be no judicial review in the form of a tort claim of a private hospital's decision to terminate medical staff privileges, even to ensure that it was not arbitrary, capricious or unreasonable. [Citations omitted.] This doctrine was recently examined and upheld by the Sixth Circuit in *Samuel* [*supra*].
>
> Plaintiff cannot avoid the rule of judicial nonreviewability by characterizing her claims as "tortious interference" or "intentional infliction of emotional distress." This would "necessarily involve a review of the decision to terminate and the methods behind that decision, thus making a mockery of the rule that prohibits judicial review of such decisions by private hospitals." [*Savas, supra* at 668.]

Hence, unlike the majority, I do not believe that post-*Hoffman* Courts, such as *Long* and *Sarin*, went beyond *Hoffman's* public/private hospital ruling when they refused to review contract and certain tort claims that necessitated interfering with the hospital's decision regarding

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[2] Although "promissory estoppel is akin to a contract claim," *Long, supra* at 588, tortious interference with contract and tortious interference with advantageous business relations are clearly distinct torts. *Winiemko v Valenti*, 203 Mich App 411, 418 n 2; 513 NW2d 181 (1994); *Feaheny v Caldwell*, 175 Mich App 291, 300-301; 437 NW2d 358 (1989). These torts nonetheless fell within the *Hoffman* rule because they were so closely enmeshed with the contract claims that court review would still necessitate interfering with the hospital's decision. *Sarin, supra* at 795.

a physician's staff privileges. Rather, those courts utilized one part of the *Hoffman* and *Shulman* rationales in coming to their respective conclusions.

In my view, the majority cannot reach the conclusions that it has without reversing *Sarin*,[3] and ignoring some aspects of *Long*. The *Long* Court specifically held that the nonreviewability doctrine applies "to disputes that are contractual in nature," *Long*, *supra* at 586, and that the breach of contract and promissory estoppel claims brought in that case would not be reviewed under that doctrine. *Id*. at 587-588. What the Court could not conclude, because of insufficient evidence, was whether the facts of that case might fall within the *exception* to the doctrine. *Id.* at 588. Thus, it is quite clear that *Long* does preclude breach of contract claims in cases such as this, and that *Sarin* bars tort claims that are "contractual in nature" and that challenge the hospital's staffing decision. *Long*, *supra* at 587 n 4; *Sarin*, *supra* at 791-792. Hence, without overruling *Sarin* and parts of *Long* (which cannot be done under MCR 7.215[J][1]), the majority cannot reach the legal conclusions that it has reached today.

In the present case, plaintiff's invasion of privacy, breach of fiduciary and public duties, and breach of contract claims all revolve around the decisions of, and statements made by, members of the peer review entity during their examination of plaintiff's case. According to his complaint, plaintiff's invasion of privacy claim is based on defendant's "conditioning resolution of his disciplinary actions . . . on the outcome of the HPRP process . . . ." Similarly, plaintiff's claims of breach of fiduciary and public duties and breach of contract are based on the actions and decisions of the peer review entity regarding plaintiff's situation. Thus, as in *Sarin*, I would hold that "the trial court properly concluded that it could not review plaintiff's claims without intervening in the hospital's decision and interfering with the peer review process. In so ruling, we [should] repeat our adherence to and support of the rule that prohibits judicial review of the action of a private hospital" in disciplining plaintiff, a staff physician. *Sarin*, *supra* at 795.

I would affirm the dismissal of plaintiff's tort and contract claims. Otherwise, and with the one noted exception regarding the majority's analysis of MCL 331.531, I join in the majority opinion.[4]

/s/ Christopher M. Murray

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[3] Although *Sarin* was decided before 1990, it should still be followed under stare decisis principles unless it is distinguishable or overruled.

[4] As defendants point out, there may be other reasons why plaintiff's civil rights claims cannot be maintained. For example, claims under 42 USC 1983 generally must be brought against governmental entities or individuals acting under color of law. See, e.g., *Wyatt v Cole*, 504 US 158, 161; 112 S Ct 1827; 118 L Ed 2d 504 (1992). However, the trial court did not address these many issues, and should do so in the first instance.